

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

ePLUS, INC.,	:	
	:	
Plaintiff,	:	
v.	:	Civil Action
	:	No. 3:09CV620
LAWSON SOFTWARE, INC.,	:	
	:	February 11, 2011
Defendant.	:	

COMPLETE TRANSCRIPT OF **CONFERENCE CALL**  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE.

APPEARANCES: (Via telephone)

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8 Counsel for the defendant Lawson Software.

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1 (The proceedings in this matter commenced at  
2 4:00 p.m.)

4 THE COURT: All right. This is ePlus against  
5 Lawson. Who's on for whom?

6 MR. ROBERTSON: Scott Robinson, Your Honor,  
7 for plaintiff ePlus. And my partner Michael Strapp is  
8 on as well as Henry Willett from Christian Barton.

9 THE COURT: All right.

10 MR. CARR: Your Honor, this is Dabney Carr  
11 for defendant Lawson. And Dan McDonald at Merchant &  
12 Gould is also on the line.

13                   THE COURT: All right. Well, I've read  
14 through your papers. I'm in the middle of a criminal  
15 trial taking an afternoon recess. So let's boil it  
16 down to the essence.

17                   What is this man Evans, what is he going to  
18 testify to that's not already in the record or that I  
19 can't do by reviewing the law?

20 MR. ROBERTSON: Your Honor, one of the  
21 things -- this is Mr. Robertson, I'm sorry. One of  
22 the things I wanted to do is just address this issue  
23 of the licensing of the patents-in-suit.

24 The Court has heard on numerous times Mr.  
25 McDonald argue that ePlus has licensed freely. And

1 the licenses are in evidence, but Mr. Evans is a  
2 licensing expert. And Mr. Evans can speak to directly  
3 what those terms are, how they were carefully  
4 negotiated, how the grant is strictly circumscribed,  
5 how the grant is not transferable, a lot of the  
6 factors that go into the test the Court is going to  
7 have to consider under the eBay decision.

8 There have been numerous experts who  
9 testified as to those facts. I fashioned this as both  
10 a Rule 26 disclosure and a declaration. A declaration  
11 that the Court can consider when it considers our  
12 briefing on the issue after we've had an evidentiary  
13 hearing.

14 We don't have to call Mr. Evans. I'd like to  
15 call him. I think it would be probably 30 minutes of  
16 direct examination. But here's the dilemma I find  
17 himself in, Your Honor.

18 On numerous occasions Your Honor, correctly  
19 so, has directed the parties to march down to Judge  
20 Dohnal's office and see if we can't resolve this case.  
21 Judge Spencer did exactly the same thing, too, in the  
22 SAP case. And I did march down that hallway, and I  
23 did settle the case with SAP. And now three years  
24 later I'm hearing, Well, ePlus licenses freely because  
25 it resolves these disputes.

1                   The Court knows, quite correctly, that  
2 resolution of litigation by settlement agreements and  
3 in patent cases by license agreements is a favored  
4 policy. It has to be so. There are scarce judicial  
5 resources, and we need to resolve these cases on a  
6 favorable basis if we can. And we shouldn't be heard  
7 three years later down the road to say, Well, ePlus  
8 licenses people, therefore it's not entitled to a  
9 remedy. That's just wrong, Your Honor.

10                  If Judge Spencer had said to me, Do this, and  
11 I would have said, Wait, three years from now I'm  
12 going to be in front of Judge Payne, and someone is  
13 going to turn around and say I license freely, he  
14 would have laughed at me. But that's exactly what's  
15 going on here.

16                  THE COURT: Well, he probably would have  
17 walked down the hall and hit me.

18                  MR. ROBERTSON: Well, but Mr. Evans can put  
19 this in context. He can describe the nature of these  
20 licenses. He speaks to several factors on this, Your  
21 Honor, the adequate remedy of the law. We're in the  
22 position we're in. The only remedy we have now is an  
23 injunction. And Lawson would have us have no remedy,  
24 Your Honor, by saying because we license freely,  
25 according to them. I can tell you, nothing could be

1 more free than the license I'm not going to give to  
2 Lawson. But we license freely, you should address  
3 that issue. The balance of the hardships, you can  
4 address that issue, and whether or not it's in the  
5 public interest, be able to resolve patent disputes  
6 through licensing.

7                   This all comes, Your Honor, from a  
8 concurrence of Judge Kennedy in the eBay case, a  
9 concurrence that I would say was not, let's just say,  
10 wisely thought through. Because how are federal  
11 judges to resolve disputes if they can't in a patent  
12 case have the parties enter into a mutually agreeable  
13 license?

14                   And I will just observe, Your Honor --

15                   THE COURT: Well, it would be contrary to the  
16 whole process of litigation if we couldn't do that.

17                   MR. ROBERTSON: Exactly.

18                   THE COURT: It would lead to nothing but  
19 lawsuits going to trial and never getting resolved,  
20 and it would discourage people from settling cases  
21 ahead of time because they would have nothing at all  
22 to lose at the end of the case. So I'm not buying  
23 that argument. So I don't know why I need anybody to  
24 tell me about that, though.

25                   MR. ROBERTSON: I'd like him to explain to

1 you about how these licenses were narrowly  
2 circumscribed, but, Your Honor, I don't need to call  
3 him as a witness. You have his declaration. The  
4 Court understands the law, and the Court can accept  
5 it, reject it, or otherwise. But only today I was  
6 informed by Mr. Strapp that Mr. Carr has said that  
7 Lawson is calling multiple unnamed witnesses that have  
8 never been disclosed pursuant to Rule 26 to testify  
9 that it's against the public interest for injunctions  
10 to enter. I don't even know who they are. They have  
11 never been identified before to this day.

12 THE COURT: Whoa, whoa.

13 MR. CARR: Judge, that's far afield of this  
14 motion.

15 THE COURT: Whoa. Wait a minute. We're not  
16 going to have that. Hold on.

17 MR. ROBERTSON: I'm sorry.

18 THE COURT: Time out.

19 When I said "supplement your disclosures for  
20 the injunction," I meant those things that had been  
21 already posited and needed to be supplemented. I  
22 didn't mean start all over again with something new,  
23 either one of you.

24 And why do I need to be told -- but I think I  
25 do need to understand what Lawson proposes to do in

1 order to assess this part of this issue.

2 So what is it that Lawson proposes to do on  
3 the issue of the injunction? The brief says you're  
4 not really going to call anybody.

5 MR. CARR: Your Honor, the brief says -- I'm  
6 sorry. This is Dabney Carr. The brief says that we  
7 won't call any experts. And we aren't calling any  
8 experts. And I'll mention that ePlus on Monday  
9 identified a great deal of new information that it was  
10 going to rely on in addition to witnesses that it was  
11 going to rely on, fact witnesses, on the injunction.

12 We're going to do nothing different than what  
13 ePlus has done. And perhaps Mr. McDonald can address  
14 more specifically which witnesses we're going to use,  
15 but I recall that at the hearing on January 27th  
16 before Your Honor Mr. McDonald was quite clear that we  
17 would have to offer a witness from Lawson on the issue  
18 of the irreparable harm to Lawson from the entry of a  
19 permanent injunction in order to make a record on that  
20 issue. So we're not doing anything differently --

21 THE COURT: Well, that's one witness on the  
22 irreparable injury to Lawson. That's not anything to  
23 do with public interest. What's the public interest?

24 What are we talking about, Mr. McDonald?

25 MR. McDONALD: I think on the public interest

1 issue, Your Honor, we don't really have any new  
2 witnesses on that issue. We might have our people  
3 that are already on our witness list that are even on  
4 ePlus's witness list specific to this hearing, like  
5 Mr. Frank, perhaps talk about the impact of a possible  
6 injunction on our customers, and maybe one could  
7 categorize that as the public interest, maybe not, I  
8 don't know, but we're not really going to do anything  
9 farther afield than that.

10 On this licensing issue that we're talking  
11 about today with Mr. Evans, we don't have any new  
12 witnesses or old witnesses, for that matter. I think  
13 we're going to rely on the fact record there, but it  
14 is certainly relevant what's going on in the  
15 competitive marketplace. That's very clear from the  
16 case law to know how prominent a competitor Lawson is  
17 in this marketplace versus others in the marketplace  
18 so we know if Lawson is marketing, what's going to be  
19 the impact on ePlus.

20 Well, the fact that SAP has the research  
21 reports that are already in evidence show --

22 THE COURT: Show down. You're going so fast  
23 that there's not even a break that I can tell you to  
24 slow down. You filled up the airways. I lost  
25 everything you said and so did the court reporter.

1                   MR. McDONALD: Okay. To back it up here,  
2 we're certainly not planning on bringing in a witness  
3 on the issue of the licensing, what these license say.  
4 I think they speak for themselves. I don't see any  
5 need for any witnesses to tell the Court what the  
6 licenses say or how the law should relate to that.

7                   This issue of bringing in new witnesses on  
8 the public interest, I think was the Court's question.  
9 What I was saying is we will use a witness perhaps  
10 that's already on ePlus's list. They've asked us to  
11 bring Mr. Frank of Lawson, for example, to talk. And  
12 he has some knowledge of at least what an impact of  
13 the injunction might be on Lawson's customers and  
14 perhaps that would be considered some part of the  
15 equitable considerations here whether it's considered  
16 public interest or something else.

17                  I suppose the label, different people can  
18 label it different ways, but there may be that, but  
19 we're not going to be bringing in any experts or  
20 anybody else, frankly, just from a public interest at  
21 some broad perspective. That's not going to happen.

22                  What is going to happen is we already have on  
23 record some research reports like from Gartner and  
24 AMR, etc., about who actually competes in this  
25 marketplace, and that's certainly very relevant to

1       whether or not there's any irreparable harm to ePlus  
2       from an injunction because if ePlus is a small player  
3       in this market and Lawson is a small player in this  
4       market, which those research reports show, that's  
5       certainly going to be relevant to whether or not an  
6       injunction or not having an injunction even affects  
7       ePlus in any significant way.

8                   We will be updating those research reports.  
9        We're trying to get some 2010 versions of those to  
10       show that, in fact, those parties are small in this  
11       market and are dominated by parties such as SAP and  
12       Ariba, who are licensees. And for whatever reason,  
13       whether the public policy favors licenses or not, the  
14       fact is that those are the dominant players in the  
15       marketplace as well as some others that are not  
16       licensees, that's certainly going to be very relevant  
17       to whether or not an injunction against a party that  
18       has 1 percent or 4 percent of the market like these  
19       research reports show Lawson has, well, that certainly  
20       is going to indicate that an injunction isn't going to  
21       help ePlus. It's not going to alleviate any lost  
22       market shares or sales to ePlus because there aren't  
23       any when the market is sliced up in that particular  
24       way.

25                   Also a --

1           THE COURT: Wait a minute. I'm not following  
2 what you're saying. It seems to me that what you're  
3 really saying is that both of you compete in the small  
4 player part of the same market. You're not competing  
5 with SAP. You're competing with the small boys.

6           MR. McDONALD: That's not correct. These  
7 research reports show who the competitors are in these  
8 marketplaces. Lawson might be about No. 10 on some of  
9 these lists. So we're certainly competing out there  
10 in these marketplaces, but it's a very small  
11 percentage of the market share. That doesn't  
12 necessarily mean we're competing for the same  
13 customers. That's not an implication of that at all.

14           MR. ROBERTSON: This is Mr. Robertson.

15           I'm not going to argue the merits of this.  
16 We have a hearing coming up, and then you have an  
17 April 4 hearing on this stuff.

18           I will agree with Mr. McDonald that  
19 competition is important. I don't understand the  
20 argument because I'm an adjudicated infringer, but I'm  
21 only a small part of the market. That means you don't  
22 get an injunction. But we'll address that at the  
23 time.

24           What I just want to make clear here is if the  
25 Court doesn't want to hear Mr. Evens, I understand.

1 I'd like the declaration to be considered for what the  
2 Court considers its value to be, if any. I can call  
3 Mr. Evens if they want to cross-examine him, but I  
4 don't have to. And that's what we're here on today.

5           But I want to make sure because Mr. Strapp,  
6 who's on the phone, and Mr. Carr, who's on the phone,  
7 had a conversation this morning where it was  
8 represented, from what I understood, that there was  
9 going to be some third-party witnesses, customers of  
10 Lawson, called about the public interest. And I'm  
11 hearing Mr. McDonald say just the opposite.

12           If that's the case, I'll take him at his  
13 word, but I don't want to be surprised by any  
14 witnesses that have not been previously disclosed and  
15 are going to be told to me for the first time  
16 apparently on Monday.

17           If that's the case, Mr. McDonald, please let  
18 me know now because I just appreciate that heads up.

19           MR. McDONALD: At this point I don't  
20 anticipate that we're going to be using any customer  
21 declarations or witnesses or anything like that. I  
22 guess if we were, it might be one customer of some  
23 sort to give that perspective, but it certainly  
24 wouldn't be anything dramatically different from  
25 what's already been heard before.

1                   THE COURT: You-all are going to know what  
2 each other is going to tender on Monday. So why don't  
3 you save your powder until then.

4                   I will say this: Licenses are not simple  
5 matters. The terms of the licenses, it might be  
6 helpful to have them discussed to some extent, but  
7 other factors that are in Mr. Evans' affidavit or  
8 report or whatever it is, Rule 26 expert disclosure --  
9 is there anything I don't know about ePlus' efforts to  
10 enforce its patents rights so far?

11                  MR. ROBERTSON: He does address competition,  
12 but, you know, that's the guts of it. A large part of  
13 it is his substantial credentials.

14                  THE COURT: So you want me to be influenced  
15 by his credentials even though juries are not supposed  
16 to be influenced by the *eminence grise* of the experts  
17 but by the substance of what they say. Is that what  
18 you're saying, Mr. Robertson?

19                  MR. ROBERTSON: That's exactly right, Your  
20 Honor. I'd like you to be very impressed with his  
21 credentials, but I think the man knows licensing and  
22 understands how these licenses arose. But I think  
23 Your Honor understands the public policy that's at  
24 work here.

25                  As I say, you've given us a day, and I

1 remember when we were trying this case, Judge, and we  
2 had about five and a half hours of actual testimony.  
3 I was planning on calling three witnesses. If  
4 Mr. Evans isn't one of them, that's fine. The Court  
5 can consider his declaration for whatever value or  
6 lack of value it finds. But I would like the Court to  
7 understand that these licenses were carefully  
8 negotiated and painstakingly circumscribed such that  
9 we do not exercise -- we're not a patent troll out  
10 there, as Mr. Devis, the CEO of Lawson, suggested the  
11 day after the jury verdict out there just licensing  
12 anybody.

13 We spent millions of dollars to bring this  
14 infringer to where we find ourselves now, and we want  
15 a remedy, Judge. We don't have damages. If we don't  
16 have an injunction, quite frankly, sir, we'll be the  
17 first prevailing patent owner in the history of the  
18 United States that never got a remedy.

19 MR. McDONALD: Well, on that issue, Your  
20 Honor, I think Mr. Robertson would like you to think  
21 it's an injunction or nothing, but the fact is that  
22 after a trial, the patent statute does provide for the  
23 right for an accounting, and the Court could grant the  
24 royalty going forward.

25 He doesn't want to talk about that unless the

1 Court denies him an injunction, but the fact that the  
2 Court excluded their damages before the jury  
3 pre-verdict does not necessarily preclude the Court as  
4 an equitable matter of awarding a royalty as an  
5 alternative to an injunction post-verdict.

6 MR. ROBERTSON: That's a whole nother hearing  
7 for a whole nother day, Mr. McDonald, if that ever  
8 gets there because there's no evidence of record right  
9 now as to what -- whether or not the Court could even  
10 impose compulsory license on ePlus.

11 MR. McDONALD: Well, I understand it's not of  
12 record right now because ePlus does not want to make  
13 that record because they don't want the Court to  
14 realize that is an alternative, but that doesn't mean  
15 it's not an adequate legal remedy or equitable remedy  
16 alternative to an injunction.

17 THE COURT: Can I do that on the basis of the  
18 existing record, Mr. McDonald?

19 MR. McDONALD: I don't think you could, Your  
20 Honor. I think you would have to have a separate  
21 hearing on that. We have a whole new deck that we've  
22 dealt here because the jury found that the core  
23 procurement product and core product with EDI do not  
24 infringe. So I think that dramatically affects the  
25 value of the reasonable royalty specific to the RSS

1 and Punchout alternatives. That was not something  
2 that really could have been dealt with even before  
3 trial. So I think we need a new record on that.

4 MR. ROBERTSON: Mr. McDonald, you shouldn't  
5 be complaining about a permanent injunction because  
6 you've got the core technology you can just tell your  
7 customers to convert to. Why don't you just rely on  
8 that? So there's no harm to Lawson at all.

9 THE COURT: Did you all agree to both root  
10 for the Packers in the Super Bowl? Because that's the  
11 only thing you agreed on.

12 I don't think I need to hear from Mr. Evans.  
13 If there are any other problems that arise when  
14 you-all do your filings, we'll have to deal with it.  
15 And if somebody is trying to get up on somebody  
16 because this is an equitable proceeding, I believe  
17 that it would be appropriate for me to give you all a  
18 relief if you're not following the instructions that I  
19 gave you or somebody is being unfair. I'll just wait,  
20 and in the words of my colleague Judge Williams, and  
21 abide the event.

22 In the meantime, Mr. McDonald, if your client  
23 is banking on no injunction, then I suggest maybe your  
24 client might want to reflect on that and whether  
25 that's really a very viable position.

1           Have you all arranged to talk to Judge  
2 Dohnal?

3           MR. ROBERTSON: Your Honor, I think what Mr.  
4 Carr communicated is that we were interested in  
5 talking about mediation.

6           THE COURT: Oh, yeah. Have you arranged with  
7 that mediation yet?

8           MR. McDONALD: No, we haven't. We've been  
9 dealing with this evidentiary disclosure.

10          THE COURT: Good. You're going to either do  
11 it with Judge Dohnal or you're going to do it  
12 independently, and you're going to do it on a tight  
13 schedule, and I don't have time to deal with it now.  
14 I want the name on Monday of who you want to mediate  
15 with and the date. On Tuesday, I'd like to know what  
16 schedule you have set up for achieving mediation  
17 within the short range. That meaning two or three  
18 weeks.

19          And you just tell your chief executive  
20 officer that he or she will be there, each one of you.  
21 And there will be no --

22          MR. ROBERTSON: I would like to deal with  
23 Judge Dohnal, Your Honor.

24          THE COURT: There's no substitutes. There's  
25 no nothing going on. This has not been intelligently

1 approached from a standpoint of commercial resolution  
2 as of this date, and I don't know why that's so, but  
3 it hasn't, and I'm going to make sure it happens now.

4 I thought that you all told us that you both  
5 agreed to go with an outside mediator who was a  
6 software expert.

7 MR. CARR: No, Your Honor, it was me who  
8 spoke to Erica Haggard, and what I said was that  
9 Lawson wanted to go with an outside mediator, and I  
10 wanted to make sure it was all right with you before  
11 we approached ePlus about it, and she said that it was  
12 all right with you.

13 THE COURT: Yeah, you can talk about it, but  
14 have you resolved it?

15 MR. CARR: We have not, Your Honor.

16 THE COURT: Have you talked to them about it?

17 MR. CARR: Mr. McDonald will have to respond  
18 to that.

19 MR. McDONALD: No, I haven't talked to Scott  
20 about that, Your Honor, I'm sorry, but we will do that  
21 immediately.

22 THE COURT: Yeah. I'll hear from you on  
23 Monday who your mediator is. It's either that or  
24 Judge Dohnal. And we're going to get going on it.

25 MR. CARR: Judge Payne, this is Dabney Carr

1 again. Before we get off the line, just a  
2 clarification about Mr. Evans.

3 You had said you did not want to hear from  
4 Mr. Evans. Our motion was both to strike his  
5 declaration and not to hear from him. I heard  
6 Mr. Robertson say a few times that he is satisfied  
7 with you considering that declaration for what it's  
8 worth. We would request that the entire declaration  
9 be struck from the record.

10 THE COURT: Well, I'll deal with that later.  
11 I may even need to call him back and hear him  
12 depending on how you-all approach this thing now.

13 I'm kind of worn thin with people trying to  
14 get one up on each other and not actually discussing  
15 exactly how to proceed. If I have to, I'll just  
16 restructure the whole thing and we'll have expert  
17 testimony. I'll just jettison everything that's been  
18 done to date, and we'll have expert testimony, and  
19 we'll deal with it.

20 I'm trying to get you-all to do this in a way  
21 that gets it done quickly and reasonably because  
22 you-all have it all fresh in your minds, so do I, and  
23 I was trying to save you the economic burden of a more  
24 full scale hearing, but if I have to do it that way, I  
25 will.

1           All right. Thank you all very much.

2           MR. CARR: Thank you, Your Honor.

3           MR. ROBERTSON: Thank you, Your Honor.

4           THE COURT: Bye.

5

6           (The proceedings were adjourned at 4:28 p.m.)

7

8           I, Diane J. Daffron, certify that the  
9 foregoing is a true and accurate transcription of my  
10 stenographic notes.

11

/s/

2/13/11

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DIANE J. DAFFRON, RPR, CCR

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DATE

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